



1 first motion to amend his complaint. See Docket No. 142.

2 **Background**

3 Plaintiff, presently incarcerated in the Arizona State  
4 Prison in Florence, Arizona, filed a *pro se* complaint pursuant  
5 to 42 U.S.C. § 1983 on June 28, 2004, and filed an amended  
6 complaint on August 11, 2004. Docket No. 9. Plaintiff has been  
7 deemed an abusive litigant, who is prohibited from filing *in*  
8 *forma pauperis* section 1983 complaints absent a showing of  
9 "imminent danger of serious physical injury." Docket No. 12.

10 On September 16, 2004, the Court ordered Defendants to  
11 respond to Plaintiff's allegation that Defendants violated  
12 Plaintiff's Eighth Amendment rights because Defendants did not  
13 provide Plaintiff with adequate medical treatment for his  
14 hepatitis C. See Docket No. 12. The parties entered into  
15 discovery and Plaintiff was deposed. The date for completing  
16 discovery has expired, and the deadline for filing dispositive  
17 motions was January 30, 2006. See Docket No. 128. On January  
18 30, 2006, Defendants filed a motion for summary judgment;  
19 Plaintiff's response to the motion is due March 2, 2006.

20 Plaintiff did not lodge a proposed amended complaint.  
21 Plaintiff seeks to amend his complaint to allege "violations of  
22 the Americans with Disabilities Act (ADA)" and to add  
23 defendants. Docket No. 139 Plaintiff also seeks leave to amend  
24 to assert further factual allegations with regard to events  
25 which have occurred since he filed his first amended complaint,  
26 and Plaintiff further seeks to "have this case certified as a  
27 class action." Id.

### Analysis

Rule 15(a), Federal Rules of Civil Procedure, provides that a plaintiff should be given leave to amend his complaint when justice so requires. See, e.g., United States v. Hougham, 364 U.S. 310, 316, 81 S. Ct. 13, 17 (1960); Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). "Thus Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality. This policy is applied even more liberally to pro se litigants." Eldridge v. Block, 832 F.2d 1132, 1135 (9th Cir. 1987) (internal citations and quotations omitted).

However, in exercising its discretion with regard to a motion to amend a complaint filed after a responsive pleading, the Court should consider the prejudice to the opposing party and the futility of allowing the amendment. See Schlachter-Jones v. General Tele., 936 F.2d 435, 443-44 (9th Cir. 1991). "[T]he policy of allowing the amendments of pleadings must be tempered with considerations of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Id. at 443 (internal quotations omitted). The Court would eventually have to dismiss a claim added to a complaint if the plaintiff raised a claim that was legally frivolous or malicious, that failed to state a claim upon which relief may be granted, or that sought monetary relief from a defendant who is immune from such relief. 42

1 U.S.C. § 1997(c)(1) (2003 & Supp. 2005).

2           Plaintiff's motion to amend should be denied because it  
3 would not facilitate a decision in this matter on the merits and  
4 because it would cause undue delay and prejudice to Defendants.  
5 Plaintiff states no basis on which the Court could properly find  
6 that his claim would provide a basis for a class action suit  
7 and, therefore, this amendment would be futile. Plaintiff's  
8 failure to previously amend his complaint constitutes undue  
9 delay and, given Plaintiff's status as a vexatious litigant, may  
10 be construed as exhibiting a dilatory motive.

11           The motion to amend should be denied with respect to  
12 addition of an ADA claim because Plaintiff should not be allowed  
13 to amend the complaint to state a separate cause of action with  
14 different elements of liability after Defendants have completed  
15 discovery and filed a motion for judgment as a matter of law  
16 with regard to the original cause of action.

17           Defendants would be unduly prejudiced should Plaintiff  
18 be allowed to amend his complaint at this late date to add a  
19 claim or to add defendants. Additionally, the Court's  
20 discretion should not be exercised to allow Plaintiff to add new  
21 factual allegations to his complaint which would, in effect,  
22 alter his claim for relief. Cf. Jackson v. Bank of Hawaii, 902  
23 F.2d 1385, 1387 (9th Cir. 1990) (upholding the denial of leave  
24 to amend because the plaintiff had delayed filing the amended  
25 complaint for eight months beyond the time they should have  
26 known of the existence of the claims and noting that  
27 "[p]rejudice to the opposing party is the most important factor"

1 in determining whether to grant leave to amend); Duggins v.  
2 Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999)  
3 (upholding denial of leave to amend where the District Court  
4 cited the plaintiff's undue delay in missing the deadline to  
5 amend the complaint and undue prejudice to the defendant where  
6 the plaintiff sought amendment after the close of discovery);  
7 Smith v. Angelone, 111 F.3d 1126, 1134 (4th Cir. 1997) (stating  
8 that "a motion to amend may be denied when it has been unduly  
9 delayed and when allowing the motion would prejudice the  
10 nonmovant").

### 11 Conclusion

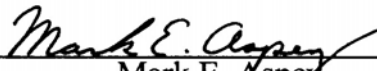
12 Allowing Plaintiff to add an additional cause of action  
13 to this suit at this time in these proceedings, which would  
14 require further discovery, prejudice newly added defendants, and  
15 delay the proceedings, is not in the interests of justice in  
16 this matter. See Divkovic v. Southern California Edison Co.,  
17 302 F.3d 1080, 1087 (9th Cir. 2002).

18  
19 **THEREFORE, IT IS RECOMMENDED THAT** Plaintiff's motion to  
20 amend his complaint (Docket No. 139) be **denied**.

21  
22 This recommendation is not an order that is immediately  
23 appealable to the Ninth Circuit Court of Appeals. Any notice of  
24 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate  
25 Procedure, should not be filed until entry of the district  
26 court's judgment.

1 Pursuant to Rule 72(b), Federal Rules of Civil  
2 Procedure, the parties shall have ten (10) days from the date of  
3 service of a copy of this recommendation within which to file  
4 specific written objections with the Court. Thereafter, the  
5 parties have ten (10) days within which to file a response to  
6 the objections. Failure to timely file objections to any  
7 factual or legal determinations of the Magistrate Judge will be  
8 considered a waiver of a party's right to de novo appellate  
9 consideration of the issues. See United States v. Reyna-Tapia,  
10 328 F.3d 1114, 1121 (9th Cir.) (en banc), cert. denied, 540 U.S.  
11 900 (2003). Failure to timely file objections to any factual or  
12 legal determinations of the Magistrate Judge will constitute a  
13 waiver of a party's right to appellate review of the findings of  
14 fact and conclusions of law in an order or judgment entered  
15 pursuant to the recommendation of the Magistrate Judge.

16 DATED this 15<sup>th</sup> day of February, 2006.

17  
18  
19   
20 Mark E. Asper  
United States Magistrate Judge  
21  
22  
23  
24  
25  
26  
27  
28